PERUMAHAN NCK SDN BHD

v.

ARAB-MALAYSIAN MERCHANT BANK & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-26-1998]
28 SEPTEMBER 1999

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Failure to comply with rules of pleadings - Statement of claim lacking in particulars - Whether an abuse of the process of court - Rules of the High Court, O. 18 r. 19*

The plaintiff commenced a writ action against the 2nd defendant, alleging *inter alia* that the 2nd defendant had wrongfully or prematurely made a demand on the performance bond and had wrongfully terminated the contract entered into between them. The 2nd defendant then filed an application to strike out the writ and statement of claim under O. 18 r. 19 Rules of the High Court 1980 on the ground that the writ and statement of claim were an abuse of the process of the court. The basis of the 2nd defendant's application was that, in failing to furnish particulars of various averments in the statement of claim, such as averments as to fraud, delay, collusion and bad faith on the part of the 2nd defendant, the plaintiff had failed to comply with the rules of pleadings. In support of the application, the 2nd defendant relied on the case of *Wharf Properties v. Eric Cumine Associate* .

Held:

[1] In the *Wharf* case, the reason the statement of claim there was found to be an abuse of the process of the court was not simply because it did not comply with the rules of pleadings. The abuse of process laid in what was revealed through the process of requesting for further particulars.

[2] The statement of claim here, simply because it was deficient in particulars and in other respects, could not be said to be an abuse of process and thus did not deserve to be struck out on that ground.

[3] The 2nd defendant's attempt to have the writ and statement of claim struck out as an abuse of process, grounded as it were on non-compliance of the statement of claim with rules of pleadings, was premature.

[Second defendant's application dismissed.]

Case(s) referred to:
Wharf Properties v. Eric Cumine Associates [1991] 52 BLR 1 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)

Other source(s) referred to:
Hudson's Building Contracts, 11th edn

For the plaintiff - V Pradhan (David Lee with him); M/s SN Yap & Assoc
For the 2nd defendant - M Chang; M/s Suhaimi Khor Zulkifli & Chang

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Aziz Mohamad J:

The plaintiffs entered into a building contract with the second defendants for the construction by the plaintiffs of certain works. In connection with the contract, the plaintiffs obtained from the first defendants a performance bond in favour of the second defendants. Alleging, *inter alia*, that the second defendants had wrongfully or prematurely made a demand on the performance bond and had wrongfully terminated the contract, the plaintiffs, by their writ action in this case, seek declarations that the demand for payment on the bond was, *inter alia*, unlawful, that the bond had, *inter alia*, been discharged and that any payment on the bond must await the findings in an arbitration between the parties as to whether the plaintiffs were in actual breach of their obligations under the contract and whether the second defendant had wrongfully terminated the contract. They also seek an injunction to restrain the second defendants from receiving from the first defendants any moneys guaranteed by the bond. They also seek damages, but it is not clear what they are for. In their statement of claim, as a basis for contending that the call on the bond was, *inter alia*, unlawful, the plaintiffs aver that while they had not been wanting in the performance of their part under the contract (para. 8), the second defendants had, in breach of their obligations under the contract, caused delays to the progress of the works without granting to the plaintiffs any, or any adequate, extension of time (para. 9).

By the present application, the second defendants seek an order striking out the writ and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980. Oral submissions were made first by the second defendants' counsel and then by the plaintiffs' counsel. When his turn came to reply to the oral submission of the plaintiffs' counsel, the second defendants' counsel put in a written submission which substantially encompasses his earlier oral submission besides containing replies to the oral submission of the plaintiffs' counsel. I mention the matter of submissions in order to introduce the second defendants' written submission, because I shall be making references to it.

The fault on the plaintiffs' part that moved the second defendants to apply for striking out is the plaintiffs' alleged failure to comply with rules of pleadings. The failure is mainly failure to furnish particulars of various averments in the statement of claim, such as averments as to fraud, delay, collusion and bad faith on the part of the second defendants. The instances of such failure are elaborated in s. 2.00 of the second defendants' written submission.

As to the various grounds for striking out that are set out in O. 18 r. 19(1), it is not the second defendants' case that, with such deficiencies, the statement of claim should be struck out for disclosing no reasonable cause of action. Although the summons-in-chambers also states that the writ and statement of claim are scandalous, frivolous or vexatious, the ground that the second defendants chiefly rely on is that, because of such failure to comply with the rules of pleadings, the writ and statement of claim are an abuse of the process of the court and should therefore be struck out. I say that because on 17 March 1998, when, while on some other application, learned counsel for the second defendants intimated to the court his intention to file a striking-out application, he said that it would be for abuse of process and in reliance solely on the statement of claim. Then, when he began his oral submission on 19 May 1998, after spending the previous day dealing with the instances of failure to comply with the rules of pleadings, he said that the foundation for the application was the case of *Wharf Properties v. Eric Cumine Associates* [1991] 52 BLR 1 ("the *Wharf Case*"), which he said was on all fours with the instant case. In the second defendants' written submission, s. 4.00 deals with abuse of process, s. 5.00, covering six pages, is a rebuttal of the plaintiffs' submission that the *Wharf Case* is not applicable to the present case, and s. 7.00, covering eight pages, deals with what constitutes an abuse of process of court. In para. 7.07 it is submitted, after the citation of several authorities, that "it is abundantly clear that non-compliance with rules, procedures and practice is an abuse of the process of court ..." It all goes to show that the ground that the second defendants seriously rely on for this application is abuse of process and the inspiration to rely on that ground is the *Wharf Case*.

Before I turn to the *Wharf Case*, I should say something about the statement that I just quoted from para. 7.07 of the second defendants' written submission. It is that I do not find that the passages from authorities that are cited in s. 7.00 of the second defendants' written submission say that non-compliance with rules of procedure is an abuse of process.

Now for the *Wharf Case*. The statement of claim was "plainly an insufficient pleading, for there is no way in which (the defendants) are able to ascertain with any precision what the case is that is being made against them" (p. 14, 19th-21st lines). So the defendants made some 357 requests for particulars of the allegations against them, of which only two the Privy Council had need to refer to, namely No. 34 and No. 44 (p. 15, 25th-30th lines). Request No. 34 sought particulars of the variations which were alleged to have been excessive. The plaintiffs failed to serve the particulars for both the requests, and the defendants sought an order for their delivery. The plaintiffs did not dispute that their pleading was inadequate without the particulars sought, and consented to give the particulars, and so delivery of the particulars was ordered (p. 16, 7th-15th lines), but the plaintiffs, although they "served what purported to be particulars in compliance with the order ... did not in fact comply with the order at all ..." (p. 16, 16th-18th lines). The answer to request No. 34 "was no more than a statement that (the plaintiffs) would inform (the defendants) at the trial which variation they considered to be excessive" (p. 16, 20th-21st lines). The answer to request No. 44 "is, in fact, not an answer to the request at all but a lengthy statement of why (the plaintiffs), having agreed to give the particulars sought, claims that it is now not able to do so" (p. 17, 5th-7th lines). So with the plaintiffs' case remaining not fully pleaded even four and a half years after the action having been on foot, the defendants applied to strike out the crucial parts of the statement of claim on the ground that they disclosed no reasonable cause of action or were otherwise an abuse of the process of the court. The learned judge refused to strike out (p. 17, 31st-45th lines). On appeal, the Court of Appeal of Hong Kong ordered that the statement of claim be struck out as disclosing no cause of action, but to Penlington JA the action should also be struck out on the additional ground that it was an abuse of the process of the court (p. 18, 3rd-12th lines).

On appeal, the Privy Council disagreed that the statement of claim disclosed no reasonable cause of action (p. 19, 22nd-25th lines; p. 20, 10th-11th lines) but agreed with Penlington JA that the statement of claim should be struck out on the ground that the process of the court was being abused (p. 22, 35th-37th lines; p. 23, 19th-25th lines). As to why Penlington JA found that the statement of claim was an abuse of the process of the court, this is what the Privy Council said at p. 20, 19th-27th lines:

> He adverted to the answer given by Wharf to request No. 34 and the frank assertion that it was being left to the court at the trial to determine what variations were 'excessive' and what effect that had. 'That approach', he commented, 'is enough, in my view, to make this speculative litigation which would throw an enormous and quite unfair burden on the defendants and should not be allowed to continue'. In the particular circumstances of the case the court should, he said, intervene to prevent an abuse of its process.

It is clear to me that in the *Wharf Case* the reason that the statement of claim was found to be an abuse of the process of the court was not simply that it did not comply with the rules of pleadings. The abuse of process lay in what was revealed through the process of requesting for further particulars. What was revealed was that the plaintiffs' action was speculative litigation that would be enormously and unfairly burdensome to the defendants and that should therefore not be allowed to continue. It was an abuse of the process of the court.

The *Wharf Case*, therefore, provides no authority for the proposition that a statement of claim that does not comply with rules of pleadings and is lacking in particulars is an abuse of the process of the court. It simply cannot be an abuse. The word "abuse" imports a sense of impropriety in resorting to a process of the court, something that lies behind the facade of the process. In this case, the statement of claim, simply because it is deficient in particulars and in other respects, cannot be said to be an abuse of process and does not deserve to be struck out on that ground.

In the second defendants' written submission, several passages having reference to the *Wharf Case* are quoted from *Hudson's Building Contracts*, 11th edn. For example, two passages are quoted in s. 4.00, which, according to the title of the section, is about abuse of process. Speaking generally, I would say that those passages are about the lessons to be learned from that case about bringing claims under building contracts. Certain techniques or practices are now to be eschewed if the plaintiff is not to end up as did the plaintiffs in the *Wharf Case*. A warning is given that a prospective plaintiff must, before plunging into litigation, be sure, upon sufficient preparation, that he can make out a case – that he can identify what cause has produced what effect – for otherwise his pleading will be wanting in particulars and, upon a request for particulars, his action may be exposed as speculative litigation which is an abuse of the process of the court. Those passages do not intend to say that mere deficiency in a statement of claim means or proves that it is an abuse of process. They cannot be saying so because it was not what the *Wharf Case* decided.

In my judgment the second defendants' attempt to have the writ and statement of claim struck out as an abuse of process, grounded as it is on non-compliance of the statement of claim with rules of pleadings, is premature. I dismiss the application with costs.